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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WELLS FARGO BANK, N.A., Plaintiff, v. VALLEY NATIONAL BANK, KEVIN CHITTENDEN, SHAWN CASSIDY, AND JOSEPH J. CARRELLO, Defendants.	CIVIL ACTION No.: CV17 3424 SEYBERT, J. TOMLINSON, M.J.

MEMORANDUM OF LAW IN SUPPORT OF THE APPLICATION OF WELLS FARGO BANK, N.A., FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Preliminary Statement

As set forth in detail in the accompanying Verified Complaint (cited herein as "Compl."), Defendants Kevin Chittenden, Shawn Cassidy, and Joseph J. Carrello (collectively, the "Individual Defendants") are former high-level employees of Plaintiff Wells Fargo Bank, N.A. ("Wells Fargo" or the "Company"). All three Individual Defendants had agreements with Wells Fargo providing that, for one year after leaving employment with the Company, they would not influence or advise any other Wells Fargo employees to leave the Company, and they would not influence or advise any third party to employ other Wells Fargo employees or to solicit them for employment.

All three Individual Defendants have recently resigned from Wells Fargo and gone to work for Defendant Valley National Bank ("Valley National"), a direct competitor of the Company. All three Individual Defendants have breached and continue to breach their agreements with Wells Fargo. They have done so with the knowledge and encouragement of one another and of Valley National, and are thus liable not just for breach of contract, but also for tortious interference, unfair

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competition, and conspiracy. Carrello began his efforts to recruit Wells Fargo employees for Valley National even before the effective date of his resignation, thereby breaching his duty of loyalty to Wells Fargo. As a result of Defendants' unlawful activities, Wells Fargo has lost, and in the absence of immediate equitable relief will continue to lose, highly-placed, highly-trained, and highly-valued employees, confidential information and trade secrets they have been privy to, customer relationships and goodwill they have developed at Wells Fargo's expense, and their referral sources and loan application pipelines. Wells Fargo therefore respectfully requests that the Court enter a temporary restraining order and preliminary injunction ordering Defendants to cease their unlawful activities.

Legal Argument

I. Standard for Granting Injunctive Relief.

Wells Fargo is entitled to temporary restraints because the evidence shows: (1) Wells Fargo will suffer irreparable harm in the absence of such relief; (2) either (a) Wells Fargo has a likelihood of success on the merits, or (b) the evidence shows sufficiently serious questions going to the merits to make them a fair ground for litigation and the balance of hardships is in Wells Fargo's favor; and (3) an injunction is in the public interest. *Oneida Nation v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011); *Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 85 (2d Cir. 1996); *Silberberg v. N.Y.S. Bd. of Elections*, 216 F. Supp. 3d 411, 416 (S.D.N.Y. 2016).

II. Wells Fargo Will Suffer Irreparable Harm in the Absence of Restraints.

Irreparable harm is harm "that cannot be remedied if a court waits ... to resolve the harm." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). Irreparable harm exists where monetary damages would not make the plaintiff whole. *E.g., Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 69 (2d Cir. 1999). The continuing loss of employees has been recognized as an irreparable harm justifying equitable restraints. "[A]n award of money damages is unlikely to make plaintiff whole if its current or former employees assist a competitor in hiring away key personnel." *Ikon Office Solutions, Inc. v. Usherwood Office Tech., Inc.*, No. 9202-08, 2008 WL 5206291, at *17 (N.Y. Sup. Ct. Albany Cty. Dec. 12, 2008). Wells Fargo's loss of employees constitutes irreparable harm because it deprives the Company "not only of its investment and training and developing of those employees," but also of "those employees' clients who follow the employees because of the relationships developed with them at [Wells Fargo's] expense." *Marsh USA Inc. v. Karasaki*, No. 08-4195, 2008 WL 4778239, at *14 (S.D.N.Y. Oct. 31, 2008).

III. Wells Fargo Is Likely to Succeed on the Merits.

Wells Fargo need at most show "a likelihood of success on the merits of one claim to warrant injunctive relief." *Kelly v. Evolution Mkts., Inc.*, 626 F. Supp. 2d 364, 376 (S.D.N.Y. 2009). Wells Fargo can do much better than that.

A. Wells Fargo Is Likely to Succeed on Its Breach of Contract Claim (Count One of the Verified Complaint).[1]

The elements of a breach of contract claim are (1) the existence of a contract; (2) performance by one party; (3) breach by the other party; and (4) damages. *Terwilliger v. Terwilliger*, 206 F.3d 240, 246 (2d Cir. 2000); *Iowa Arboretum, Inc. v. Iowa 4-H Found.*, 886 N.W.2d 695, 706 (Iowa 2016); *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). There is no question contracts exist between the Individual Defendants and Wells Fargo;

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[1] The Individual Defendants' Employment Agreements all contain an Iowa choice-of-law clause (Employment Agt. §16, Exs. A, C, D to Compl.), and Chittenden's Wells Fargo & Company Long-Term Incentive Compensation Plan Restricted Share Rights Award Agreement ("Award Agreement") contains a Delaware choice-of-law clause (Award Agt ¶15, Ex. B to Compl.) There is no need for the Court to determine if the choice-of-law clauses are valid, because, as demonstrated in the text, Wells Fargo is likely to succeed on its contract claim regardless of what state's law is applied.

they are attached to the Verified Complaint. There is likewise no question that Wells Fargo performed under those contracts, since the Company continued to employ the Individual Defendants until their voluntary resignations. The Individual Defendants' breaches of their contracts with Wells Fargo are detailed in the Verified Complaint, and the Company's damages – incalculable as they are – consist among other things of the loss of confidential information and trade secrets; customer relationships and goodwill; referral sources and loan application pipelines; and not least highly-placed, highly-trained, and highly-valued employees.

The restrictions in the contracts are specifically enforceable because they are "reasonable," meaning: (1) necessary to protect Wells Fargo's legitimate interests; (2) reasonable in time and geographic scope; (3) not unreasonably burdensome to the Individual Defendants; and (4) not injurious to the public. *E.g., BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389, 690 N.Y.S.2d 854, 857, 712 N.E.2d 1220, 1223 (1999); *Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc.*, 323 F. Supp. 2d 525, 533 (S.D.N.Y. 2004); *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761 (Iowa 1999); *McCann Surveyors, Inc. v. Evans*, 611 A.2d 1, 3 (Del. Ch. 1987). Courts have also repeatedly observed that "[a] covenant not to solicit employees is inherently more reasonable and less restrictive than a covenant not to compete." *Genesee Valley Tr. Co. v. Waterford Grp.*, 130 A.D.3d 1555, 1558, 14 N.Y.S.3d 605, 609 (4th Dep't 2015) (internal quotation marks omitted); *Admarketplace Inc. v. Salzman*, No. 651390/2013, 2014 WL 1278504, at *4 (Sup. Ct. N.Y. Cty. Mar. 28, 2014); *OTG Mgmt., LLC v. Konstantinidis*, 40 Misc.3d 617, 621, 967 N.Y.S.2d 823, 826 (Sup. Ct. N.Y. Cty. 2013).

1. The Restrictions Protect Wells Fargo's Legitimate Interests.

Wells Fargo's interests in preventing and stemming the loss of confidential information and trade secrets, customer relationships and goodwill, referral sources and loan application pipelines, and highly-placed, highly-trained, and highly-valued employees, are recognized by the courts as legitimate and enforceable through non-recruitment provisions like those at issue here. *See, e.g., MasterCard Int'l Inc. v. Nike, Inc.*, 164 F. Supp. 3d 592, 602 (S.D.N.Y. 2016) (holding a non-recruitment provision "designed to prevent competitors from poaching employees from MasterCard's highly developed IS [Information Security] department as well as protect against the misappropriation of MasterCard's proprietary IS network coincides with the legitimate interests recognized by courts in New York"); *Admarketplace*, 2014 WL 1278504, at *4 ("The gravamen of [plaintiff] AMP's allegations is that [defendant-competitor] VSW has been poaching employees from AMP, inducing them to switch companies for greater compensation hoping that [they] bring proprietary information with them. A nonrecruitment provision directly guts this channel of wrongful competition. This is reasonable and, therefore, enforceable"); *Genesee Valley*, 130 A.D.3d at 1558, 14 N.Y.S.3d at 609 ("an employer has a legitimate interest in preventing an employee from leaving to work for a competitor if the employee has cultivated personal relationships with clients through the use of the employer's resources"); *American Express Fin. Advisors, Inc. v. Yantis*, 358 F. Supp. 2d 818, 829 (N.D. Iowa 2005) (plaintiff AEFA showed a likelihood of success because "the restraint, preventing [defendant] Yantis from inducing AEFA's customers and employees from leaving AEFA and following him to Brecek, is reasonably necessary to protect AEFA's business and customer goodwill"); *Diversified Fastening Sys., Inc. v. Rogge*, 786 F. Supp. 1486, 1494 (N.D. Iowa 1991) (holding the provisions of a non-recruitment clause "are necessary for the protection of [plaintiff's] business, do not impinge on a former employee's rights to engage in business in the industry, and are reasonable"); *Weichert Co. of Pa. v. Young*, No. 2223-VCL, 2007 WL 4372823, at *5 (Del. Ch. Dec. 7, 2007) (holding "the business interests the covenants seek to protect, *i.e.* [plaintiff Weichert's] goodwill and relationships with employees and contractors it has trained, are legitimate").

2. The Restrictions Are Reasonable in Time and Geographic Scope.

The non-recruitment clauses' modest one-year restriction is unquestionably enforceable; even two-year restrictions are regularly upheld. *See, e.g., OTG Mgmt.*, 40 Misc.3d at 621, 967 N.Y.S.2d at 826 (upholding two-year restriction); *Ikon*, 2008 WL 5206291, at *8-10 (same); *Weichert*, 2007 WL 4372823, at *3 (upholding two-year restrictions, which "are consistently held to be reasonable"); *MasterCard*, 164 F. Supp. 3d at 601-02 (upholding one- and two-year non-recruitment provisions); *Yantis*, 358 F. Supp. 2d at 829 (upholding restriction whose "duration ... is only one year"); *Admarketplace*, 2014 WL 1278504, at *4 (upholding one-year restriction); *Marsh*, 2008 WL 4778239, at *16 (same and noting that "New York courts have routinely found one-year restrictions to be reasonable").

While there is no express geographical restriction, none is required, especially in light of Wells Fargo's nationwide presence (Compl. ¶13). *See, e.g., OTG Mgmt.*, 40 Misc.3d at 619, 622, 967 N.Y.S.2d at 824, 826 (holding enforceable clause prohibiting defendant from "soliciting any OTG employee ... for two years after the end of his employment," without geographical restriction); *MasterCard*, 164 F. Supp. 3d at 601 ("Plaintiff concedes that there is no geographic limitation on the Non-Recruitment Provision. Nevertheless, where an employer's business is conducted worldwide to a global customer base, the lack of a geographic restriction is necessary") (internal quotation marks omitted); *cf. Marsh*, 2008 WL 4778239, at *16 (noting that "New York state courts have upheld non-solicitation agreements imposing client-based restrictions without geographic limitation as to scope"); *Moore Bus. Forms, Inc. v. Wilson*, 953 F. Supp. 1056, 1064-65 (N.D. Iowa) ("The time and geographic restrictions sought to be enforced by the plaintiff (two years and clients they served within one year prior to termination of employment) fall well within the restrictions which Iowa courts routinely find reasonable and enforceable"), *aff'd mem.*, 105 F.3d 663 (8th Cir. 1996); *Research & Trading Co. v. Pfuhl*, No. 12527, 1992 WL 345465, at *12 (Del. Ch. Nov. 18, 1992) ("it is not unreasonable to restrict defendants from dealing with [plaintiff's] customers wherever located"). What matters is that the Individual Defendants are free to work where they want for whomever they want. *See, e.g., Mallory Factor Inc. v. Schwartz*, 146 A.D.2d 465, 467-68, 536 N.Y.S.2d 752, 754 (1st Dep't 1989) (enforcing restrictive covenant where defendant "was not restricted from seeking employment in any geographic region, nor was he precluded from obtaining employment with any [of plaintiff's] competitor[s], or from establishing his own public relations firm. [Defendant] was restricted only from performing work for any account [plaintiff] or [defendant] had been involved with during the term of [defendant's] employment"); *Contempo Commc'ns, Inc. v. MJM Creative Servs., Inc.*, 182 A.D.2d 351, 354, 582 N.Y.S.2d 667, 669 (1st Dep't 1992) (enforcing covenant that "did not restrict the defendants from working or seeking employment in any geographic region" and did not "preclude[defendants] from competing with the plaintiff"); *Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 202, 651 N.Y.S.2d 504, 505 (1st Dep't 1996) (affirming preliminary injunction for former employer where "[t]he covenant does not prohibit defendant from pursuing his profession or limit him geographically") (citation omitted).

3. The Individual Defendants Are Not Unreasonably Burdened.

The courts have uniformly held that non-recruitment provisions do not unreasonably burden former employees, because, as just mentioned, they remain free to work wherever they want for whomever they want. *See, e.g., MasterCard*, 164 F. Supp. 2d at 601 ("a nonrecruitment provision does not impede an individual's ability to procure new employment"); *OTG Mgmt.*, 40

Misc.3d at 622, 967 N.Y.S.2d at 826 (non-recruitment clause "imposes no meaningful burden on [defendant]," since "[t]here is no reason to believe that [defendant's] employment with [his new employer] will be impacted by his inability to recruit his former co-workers"); *Ikon*, 2008 WL 5206291, at *17 n.7 ("The Court notes that these covenants against employee solicitation do not restrict the employment opportunities available to the individual defendants (or to current Ikon employees), but simply limit who may solicit or encourage such opportunities"); *Marsh*, 2008 WL 4778239, at *18 (rejecting argument that restriction "would prevent [defendant] from earning a living as an insurance broker": defendant "would be able to continue working in the insurance brokerage business in Hawaii, and would even be able to do so at Aon [his new employer] so long as he does not solicit Marsh employees"); *Yantis*, 358 F. Supp. 2d at 829, 830 (holding non-recruitment provision "is not unreasonably restrictive of Yantis' rights"; it "does not prevent Yantis from exercising the skills and general knowledge he acquired or increased through experience or instruction during his affiliation" with plaintiff); *Weichert*, 2007 WL 4372823, at *5 (no burden where "the covenants do not prevent [defendant] Young from earning a living or continuing to pursue a career in real estate").

4. The Non-Recruitment Provisions Do Not Harm the Public.

The non-recruitment provisions at issue here do not prevent the Individual Defendants' former co-workers from leaving the Company and going to work wherever and for whomever they want, either. That being the case, they are not harmful to the public. In *MasterCard*, for example, the court held the "Non-Recruitment Provision" was not "injurious to the public at large" because it:

> merely forecloses one potential avenue for MasterCard employees to learn about job opportunities and only for a limited time frame [one year for one individual defendant, two for the other]. MasterCard employees are free to pursue employment at other companies – the Non-Recruitment provision merely limits the

> ability of former employees to assist [defendant] Nike to poach employees for a specified period. MasterCard employees are even free to pursue employment at Nike – the Non-Recruitment Provision just limits one means of learning about potential employment opportunities at Nike.

MasterCard, 164 F. Supp. 3d at 602. *See also, e.g., Ikon*, 2008 WL 5206291, at *17 n.7 (where non-recruitment provisions "do not restrict the employment opportunities available" to plaintiff's employees, "they do not implicate the policy concerns raised by covenants against competition"); *Weichert*, 2007 WL 4372823, at *5 (holding covenants enforceable that do not "prevent current Weichert employees and contractors from finding gainful employment with other real estate agencies"); *Yantis*, 358 F. Supp. 2d at 829 (finding "the restriction is not prejudicial to the public").

The contractual restrictions on the Individual Defendants are accordingly (1) necessary to protect Wells Fargo's legitimate interests, (2) reasonable in scope, (3) not unreasonably burdensome to the Individual Defendants, and (4) not injurious to the public. They are therefore valid and enforceable, and Wells Fargo is consequently likely to succeed on its breach of contract claim.

B. Wells Fargo Is Likely to Succeed on Its Claim for Breach of the Implied Covenant of Good Faith and Fair Dealing (Count Two of the Verified Complaint).

"Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389, 639 N.Y.S.2d 977, 979, 663 N.E.2d 289, 291 (1995). *Accord, e.g., Connelly v. State Farm Mut. Auto. Ins. Co.*, 135 A.3d 1271, 1274 (Del. 2016); *Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 730 (Iowa 2014). The covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Dalton*, 87 N.Y.2d at 389, 639 N.Y.S.2d at 979, 663 N.E.2d at 291 (internal quotation marks omitted). *Accord, e.g., Alta Vista*, 855 N.W.2d at 730; *Scarborough v. State*, 938 A.2d 644, 652 (Del. 2007).

The Individual Defendants knew their obligations regarding recruitment of Wells Fargo employees; they were set forth in the plain language of the agreements they signed. Moreover, on March 28, 2017, Wells Fargo, through counsel, sent letters to two of the Individual Defendants, Chittenden and Cassidy, reminding them of their obligations under their agreements, which they nevertheless breached. (Compl. ¶41 & Ex. E.) Such deliberate, willful conduct unquestionably violated the covenant of good faith and fair dealing.

C. Wells Fargo Is Likely to Succeed on Its Tortious Interference Claims (Counts Three Through Five of the Verified Complaint).

The elements of tortious interference with contract are (1) the existence of a valid contract between the plaintiff and a third party; (2) defendant's knowledge of that contract; (3) defendant's intentional and improper procuring of a breach; and (4) damages. *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426, 835 N.Y.S.2d 530, 532, 867 N.E.2d 381, 383 (2007). All these elements are met here.

First, as shown above, the Individual Defendants all had valid agreements with Wells Fargo that contained enforceable non-recruitment provisions. Second, on March 28, 2017, Wells Fargo's counsel informed Valley National of Chittenden's and Cassidy's agreements (Compl. Ex. E); and since the three Individual Defendants were longtime coworkers at Wells Fargo, they no doubt knew that each of the others had identical agreements with identical non-recruitment provisions. Third, despite Defendants' knowledge of the non-recruitment provisions, Valley National encouraged Chittenden and Cassidy to breach their agreements by inducing Carrello to leave Wells Fargo and come to work for Valley National; Valley National and Chittenden encouraged Cassidy to breach his agreement by inducing Carrello to leave Wells Fargo and come to work for Valley

National; and Valley National, Chittenden, and Cassidy encouraged Carrello to breach his agreement by inducing other Wells Fargo employees to resign from the Company and come to work for Valley National. (Compl. ¶¶29-40 and ¶49.) Finally, Wells Fargo has been and continues to be damaged by the loss of confidential information and trade secrets; customer relationships and goodwill; referral sources and loan application pipelines; and highly-placed, highly-trained, and highly-valued employees. All the elements of tortious interference are thus satisfied, and Wells Fargo is accordingly likely to succeed on its tortious interference claims.

D. Wells Fargo Is Likely to Succeed on Its Breach of Duty of Loyalty Claim (Count Six of the Verified Complaint).

It is a "firmly established principle" that "an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties." *Maritime Fish Prods. v. World-Wide Fish Prods.*, 100 A.D.2d 81, 88, 474 N.Y.S.2d 281, 285 (1st Dep't), *appeal dismissed*, 63 N.Y.2d 675 (1984) (brackets omitted). An employee breaches his duty of loyalty by "solicit[ing] his fellow employees, who later join[him] at a competing firm." *Fewer v. GFI Grp.*, 124 A.D.3d 457, 459, 2 N.Y.S.3d 428, 431 (1st Dep't 2015). *See also, e.g., First Mfg. Corp. v. Young*, No. 067961/2014, 2014 WL 5642445, at *1 (N.Y. Sup. Ct. Suffolk Cty. Nov. 3, 2014) ("Actionable breaches" include "the raiding of employees"); *Vanacore v. Expedite Video Conferencing Servs., Inc.*, No. 14-6103, 2015 WL 10553221, at *4 (E.D.N.Y. Dec. 10, 2015) (same), *adopted*, 2016 WL 1171585 (E.D.N.Y. Mar. 23, 2016).

Wells Fargo's breach of duty of loyalty claim is directed against Carrello, who after announcing his resignation from the Company, but before actually leaving, made efforts to recruit Company employees on behalf of Valley National, by throwing his own going away party and inviting Wells Fargo home mortgage consultants to it, and by telling Wells Fargo employees how much more money there was to be made at Valley National than at Wells Fargo. (Compl. ¶¶43-45.) During his last months of employment with Wells Fargo, Carrello also withheld the processing of new mortgage loan applications and securing new mortgage loans in order to take those opportunities with him to Valley National. (Compl. ¶44.) Carrello thereby breached his duty of loyalty to the Company, and Wells Fargo is accordingly likely to succeed on its claim.

E. Wells Fargo Is Likely to Succeed on Its Unfair Competition Claim (Count Seven of the Verified Complaint).

New York maintains "a vigorous unfair competition jurisprudence. Under New York law, business people are protected from all forms of commercial immorality, the confines of which are marked only by the conscience, justice and equity of common-law judges." *Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 429 (S.D.N.Y. 2014) (internal quotation marks & citation omitted), *aff'd*, 638 F. App'x 43 (2d Cir. 2016). *See also, e.g., Big Vision Private Ltd. v. E.I. Du Pont de Nemours & Co.*, 610 F. App'x 69, 70 (2d Cir. 2015) (noting "the tort of unfair competition is a broad and flexible doctrine that has been described as encompassing any form of commercial immorality, or simply as endeavoring to reap where one has not sown"). All that need be shown is that "the defendant has acted unfairly in some manner." *Kg2, LLC v. Weller*, 105 A.D.3d 1414, 1415, 966 N.Y.S.2d 298, 299 (4th Dep't 2013).

Valley National has used insiders – the Individual Defendants – to siphon off experienced and highly-valued employees, their knowledge of Wells Fargo's confidential information and trade secrets, their referral sources and loan pipelines, and their customer relationships and goodwill. By the same token, the Individual Defendants improperly used their insider contacts to the same end. It is hard to imagine any "competition" more obviously "unfair." Wells Fargo is accordingly likely to succeed on its unfair competition claim.

F. Wells Fargo Is Likely to Succeed on Its Civil Conspiracy Claim (Count Eight of the Verified Complaint).

An actionable civil conspiracy exists where there is an "underlying tort," plus "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *ACR Sys., Inc. v. Woori Bank*, No. 14-2817, ___ F. Supp. 3d ___, 2017 WL 532300, at *5 (S.D.N.Y. Feb. 8, 2017); *Haber v. ASN 50th St. LLC*, 847 F. Supp. 2d 578, 589 (S.D.N.Y. 2012); *Swartz v. Swartz*, 145 A.D.3d 818, 825-26, 44 N.Y.S.3d 452, 462 (2d Dep't 2016). "Tort" in "underlying tort" is construed broadly as "any 'unlawful' act, or a 'lawful' act done 'in an unlawful manner.'" *Haber*, 847 F. Supp. 2d at 588 (quoting *Arlinghaus v. Ritenour*, 622 F.2d 629, 639 (2d Cir. 1980)).

The "unlawful acts" here include the Individual Defendants' breach of their agreements with Wells Fargo; the tortious interference of Defendants with such agreements; Carrello's breach of his duty of loyalty to Wells Fargo; and Defendants' unfair competition with Wells Fargo. As set forth in detail in the Verified Complaint: (1) There was without doubt an agreement among the Defendants to commit the acts comprising these torts; (2) the overt acts were the solicitation of Wells Fargo employees to leave their employment with the Company; (3) Defendants necessarily engaged in these acts with the intent to recruit Wells Fargo employees away from the Company; and (4) the result was Wells Fargo's loss of confidential information and trade secrets, customer relationships and goodwill, referral sources and loan application pipelines, and the highly-placed, highly-trained, and highly-valued employees themselves. Wells Fargo is accordingly likely to succeed on its civil conspiracy claim.

IV. The Balance of Hardships and the Public Interest Favor Restraints.

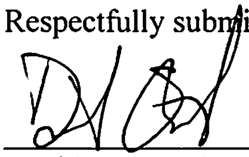
As shown above and in the Verified Complaint, absent specific enforcement of the non-recruitment provisions in the Individual Defendants' agreements with Wells Fargo and of all the Defendants' common law duties, Wells Fargo will suffer irreparable injury. On the other hand, Defendants need only comply with their legal duties, which compliance will not unduly restrict their activities. As already discussed, the agreements' non-recruitment provisions leave Wells Fargo employees – whether the Individual Defendants or current Company employees – free to work wherever they want for whomever they want. As a result, they are "not prejudicial to the public." *Yantis*, 358 F. Supp. 2d at 829. *See also MasterCard*, 164 F. Supp. 3d at 602 (non-recruitment provision not "injurious to the public at large" because it "merely forecloses one potential avenue for MasterCard employees to learn about job opportunities and only for a limited time frame"; employees remain "free to pursue employment at other companies"); *Ikon*, 2008 WL 5206291, at *17 n.7 (since non-recruitment provisions "do not restrict the employment opportunities available," they "do not implicate the policy concerns raised by covenants against competition"); *Weichert*, 2007 WL 4372923, at *5 (holding covenants enforceable that do not "prevent current Weichert employees and contractors from finding gainful employment with other real estate agencies"). Similarly, the only restriction on Valley National is that it may not use the Individual Defendants "to poach employees for a specified period." *MasterCard*, 164 F. Supp. 2d at 602.

The balance of hardships thus clearly favors preliminary restraints. *See, e.g., Pace Sec., Inc. v. Pollack*, 157 A.D.2d 557, 558-59, 550 N.Y.S.2d 299, 300 (1st Dep't 1990) (affirming preliminary injunction that "prevent[s] defendants from reaping the fruits of their improper conduct, while still allowing them to compete freely in the general marketplace"). Likewise, an injunction enforcing a party's legal duties and "the terms of a valid and enforceable contract" is always in the public interest. *Goldman, Sachs & Co. v. N.C. Mun. Power Agency No. 1*, No. 13-1319, 2013 WL 6409348, at *9 (S.D.N.Y. Dec. 9, 2013).

Conclusion

In the absence of preliminary restraints, Wells Fargo will suffer irreparable harm. Wells Fargo is also likely to succeed on the merits of its claims, and both the balance of hardships and the public interest favor preliminary restraints. The Court should accordingly grant Wells Fargo's application and issue a temporary restraining order and preliminary injunction.

Respectfully submitted,



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